

CLERK

IN THE

Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF WASHINGTON, *Petitioners*,
v.
HAROLD GLUCKSBERG, *et al.*, *Respondents*.

DENNIS C. VACCO, Attorney General of New York, *et al.*,
Petitioners,
v.
TIMOTHY E. QUILL, *et al.*, *Respondents*.

*On Writs of Certiorari
to the United States Courts of Appeals
for the Ninth and Second Circuits*

BRIEF OF FAMILY RESEARCH COUNCIL
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE*

Family Research Council, Inc., is a non-profit research and educational organization dedicated to the preservation and defense of traditional values and the family. The Family Research Council believes in the incomparable value of every human person, regardless of age or infirmity. Among the chief guardians of this principle in any society is a medical profession dedicated above all else to the preservation of human life and the equal dignity of all persons. In the opinions below, the Second Circuit and Ninth Circuit have struck a blow against the foundational ethic of medicine: that doctors must not kill. In so doing, both courts advance the unsupported contention that allowing a small measure of physician-assisted killing will advance the dignity of the dying process and have no adverse effects on the ethics of the medical profession or its dedication to preserve human life.

Other *amici*, chiefly the American Medical Association, the American Psychiatric Association, and the American Suicide Foundation, address why this contention is false in light of the contemporary medical environment. In this brief, Family Research Council invites the Court to consider the relevance of history's most tragic experience of physician-assisted death: the German euthanasia program of the 1930s and 1940s. This experience demonstrates the risks of corruption of the medical profession in particular and civil society at large inherent in implementing physician-assisted killing. Failure to heed the lessons of history's most calamitous experience in this area would be tragic. For the sake of American families and the integrity of this nation, this is a risk that should not be imposed in the guise of a newly-found right under either the Equal Protection or Due Process clauses of the Fourteenth Amendment.

* This brief is submitted with the written consent of all parties, filed with the clerk of this Court.

SUMMARY OF ARGUMENT

Under Germany's "euthanasia" program of the 1930s and 1940s, the lives of hundreds of thousands of terminally ill, incurably sick, and mentally incompetent patients were terminated by physicians who accepted the notion that there are lives not worthy to be lived. While the lessons to be learned from this chapter of history will never be free from controversy, certain facts are both indisputable and highly relevant to the question of whether any nation should enshrine a right to physician-assisted killing in its fundamental charter of rights.

First, the erosion in medical ethics that made possible the participation of German physicians and health care workers in the widespread killing of asylum patients and other "incurables" was not of Nazi, fascist, or even peculiarly German origin. The prospect of killing the chronically sick and disabled was widely discussed in Germany, and elsewhere, long before the rise of the Third Reich.

There was nothing creative or innovative about Nazi social policy in this regard. The Nazis were consistent and effective in the implementation, but responsibility for the origins of their policies rested with others—the medical profession, the scientific community, and the intelligentsia generally.

Hugh Gregory Gallagher, By Trust Betrayed: Patients, Physicians, and the License to Kill in the Third Reich 95 (1990).

Second, those guilty of crimes relating to euthanasia defended their actions at the time, at their trials, and, in the case of those who escaped serious punishment, in later years, by citing the compassionate and humanitarian motive of ending lives classified as *lebensunwerten Leben*. While the Nazi dictatorship (and, eventually, the War) provided the

conditions necessary for such killings to be carried out on a wide scale, the concept of "life unworthy to be lived" made doctors voluntary and willing participants in these events.

Third, those involved in the investigation and prosecution of these crimes confirmed their "small beginnings," and warned against the consequences of accepting similar notions in other societies.¹ Euthanasia's "small beginnings" so thoroughly corrupted German medicine that it could not resist becoming a key component of the Nazi killing machine. It is imprudent at best to presume that such "small beginnings" would not have a corrosive effect on the medical profession in this nation.

For many reasons, physician-assisted death as a purported "cure" for human suffering would be "a medical, moral, and social disaster." Daniel Callahan and Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 Rich. L. Rev. 1, 4 (1996). Alleviating the suffering of the afflicted by the infliction of

¹ In the foreword to his book, *Die Unfähigkeit zu trauern* (1977) (The Inability to Mourn), Dr. Alexander Mitscherlich, a German psychiatrist who attended the "Medical Case" Nuremberg trial, *United States v. Karl Brandt, et al.*, and prepared an abstract of the evidence and proceedings for the West German Physicians' Chambers, warned that

Today in many minds, there is a reluctance to accept the facts of history. This inclination or attitude is in some way similar to the fantasies which permeated the Third Reich. What happened in the years of the Third Reich remains alive in our subconscious, dangerously so. It will be fatal for us to lose touch with the truth of what happened then. We must struggle to seek out the truth of that era, rather than search for improved defenses to hide us from this truth.

Quoted in Gallagher, By Trust Betrayed, supra at 274.

death is a practice wholly unworthy of protection by the Constitution of the United States.

ARGUMENT

I. THE HISTORY OF "EUTHANASIA" IN NAZI GERMANY IS RELEVANT TO THE ISSUE OF WHETHER ASSISTED SUICIDE SHOULD BE RECOGNIZED AS A CONSTITUTIONAL RIGHT.

The prohibition against physicians participating in causing the death of their patients is ancient in origin and universal in scope. Even in the Netherlands, the only nation in the world to tolerate euthanasia on a large scale, the criminal prohibitions against the practice have not been repealed. Only two jurisdictions—the Northern Territory of Australia and the State of Oregon—have formally decriminalized assisted suicide. Otherwise, the laws of every nation reflect the attitude of anthropologist Margaret Mead when she described the Hippocratic Oath's proscription on physicians killing their patients as a benchmark of our civilization:

[T]his is a priceless possession which we cannot afford to tarnish, but society always is attempting to make the physician into a killer -- to kill the defective child at birth, to leave the sleeping pills beside the bed of the cancer patient. . . . [I]t is the duty of society to protect the physician from such requests.

Margaret Mead, Personal Correspondence, quoted in Maurice Levine, *Psychiatry and Ethics* 324-25 (1972).

This century has witnessed both the propagation and abhorrent consequences of an opposing ideal: the notion that, due to infirmity, suffering, or lack of consciousness, there is such a thing as a life not worthy to be lived, and hence a

responsibility on the part of the law to permit physicians to end such lives in a humanitarian manner.

Movements to legalize euthanasia are more than a century old. In the early part of this century, particularly in the years between World War I and World War II, the issue gained notoriety and support in several nations. American legal scholars such as Herbert Wechsler and Jerome Michael supported the legalization of voluntary euthanasia, and a bill to this effect was debated in the House of Lords in 1936. Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy Killing" Legislation*, 42 Minn. L. Rev. 969, 970, 1014-1018 (1958); Robert Proctor, *Racial Hygiene: Medicine Under the Nazis* 177 (1988). Public opinion was divided, Kamisar, *supra* at 1029, while elite figures such as certain Nobel Prize winners and professors at Harvard, Cornell, and elsewhere argued for "the privilege of death" for those "who wish to die." Proctor, *Racial Hygiene*, *supra* at 180.

Euthanasia also was advocated in Germany. As early as 1895, a widely-used German medical textbook made a claim for "the right to death." Michael Berenbaum, *The World Must Know: The History of the Holocaust as Told in the United States Holocaust Memorial Museum* 64 (1993). Immediately following World War I, the notion took greater root in the German medical and legal professions, instigated largely by publication by Professors Karl Binding and Alfred Hoche of *Die Freigabe der Vernichtung lebensunwertens Leben* (Permitting the Destruction of Unworthy Life) (1920). See 8 Issues in Law & Med. 221 (1992) (Patrick Derr and Walter Wright, trans.) (copies of which have been lodged with the Court).

What transpired in Germany in the late 1930s and 1940s would unalterably change the debate over the ethics and legality of physicians participating in ending the lives of their

patients. In that period, the lives of hundreds of thousands of terminally ill, incurably sick, and mentally incompetent patients were terminated by German doctors—the elite of the profession in Europe—in a program of “euthanasia” propagated both by acceptance of the “unworthy life” thesis and by the imposition of National Socialist theories of eugenics derived from earlier concepts developed by the German medical profession and intelligentsia. Michael Burleigh, *Death and Deliverance: ‘Euthanasia’ in Germany 1900-1945* 93-97, 273-277, 284-285 (1994); Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* 44-79 (1986); Gallagher, *By Trust Betrayed*, *supra* at 74-95.

In the ensuing decades, the connection of medical killing in Nazi Germany to contemporary debates regarding the legalization of assisted suicide and euthanasia has been a matter of great controversy. Burleigh, *Death and Deliverance*, *supra* at 291-298.² It is clear, however, that those closest to these events saw some connection. The condemnation of the “Nazi doctors” was universal and prompted great reflection on the question of ensuring that their actions never be repeated. As one step, the world’s physicians reaffirmed the foundational ethical principle of their profession: that doctors must not kill.³ The cases before this Court are the most important juridical test since that time of the meaning of that principle. For this reason alone, the experience which influenced so much of what

² See also Nat Hentoff, *et al.*, *Contested Terrain: The Nazi Analogy in Bioethics*, Hastings Center Rep., Aug.-Sept. 1988 at 29.

³ The *Declaration of Geneva*, adopted by the General Assembly of the World Medical Association in September 1948, re-affirmed the key precepts of the Hippocratic tradition: “I will maintain the utmost respect of human life from the time of conception, even under threat, I will not use my medical knowledge contrary to the laws of humanity.” See Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* 331 (2d ed. 1983).

the world thinks today of the issue of euthanasia is relevant to the deliberations of this Court.

The acceptance by physicians of the notion of a “life not worthy to be lived” under the “euthanasia” program was a cornerstone of the horror that was to follow. Leo Alexander, *Medical Science Under Dictatorship*, 241 New Eng. J. Med. 39, 44 (1949). Without the willingness of doctors to participate, the euthanasia program would not have occurred. Patrick Derr, *Hadamar, Hippocrates, and the Future of Medicine: Reflections on Euthanasia and the History of German Medicine*, 4 Issues in Law & Med. 487 (1989). This “cornerstone” principle persists today. The experience of the Netherlands (described in the Brief of *Amicus Curiae* the American Suicide Foundation in No. 96-110) establishes that the participation of physicians in killing their patients invariably rests upon, and propagates, the notion of life unworthy of life. The writings of pro-euthanasia philosophers James Rachels, Peter Singer, and John Harris⁴ confirm this fact. While social and political conditions in Western democracies obviously differ from those of post-World War I and Nazi Germany, the consequences of legalizing physician-assisted suicide and euthanasia will be no less dire.

II. THE GERMAN “EUTHANASIA” PROGRAM WAS CARRIED OUT BY A MEDICAL PROFESSION THAT VIEWED KILLING INCURABLE AND “MENTALLY DEFECTIVE” PATIENTS AS A HEALING ACT.

⁴ See James Rachels, *The End of Life* 77 (1986) (acknowledging that euthanasia is less about autonomy than about societal recognition that certain human beings lack sufficient human attributes to possess a “life”); Peter Singer, *Bioethics and Academic Freedom*, *Bioethics* (1990); John Harris, *Euthanasia and the Value of Life*, *Euthanasia Examined: Ethical, Clinical and Legal Perspectives* 6 (J. Keown ed. 1995).

A. Euthanasia in Germany Began with Proposals for Medical Killing, Under Strict Guidelines, of Defined Classes of Incurable Patients.

In interbellum Germany, the medical and legal professions were influenced by proposals that patients in certain categories would benefit from hastened death. In so doing, "the most humane, the most sophisticated, the most scientifically advanced medical community [in] the world" between 1920 and 1940 self-destructed formulating and promoting ideas of physician-assisted death. Derr, *supra*, 8 Issues in Law & Med. at 488. See also Proctor, *Racial Hygiene*, *supra* at 282-83; Lifton, *The Nazi Doctors*, *supra* at 45-51; Burleigh, *Death and Deliverance*, *supra* at 11-20. *Sterbehilfe*, "dying help," was advocated by the elite medical profession for the incurably sick and was considered to be *Wohltat*, a merciful act. Proctor, *Racial Hygiene*, *supra* at 178-79.

1. Hoche and Binding.

The Binding and Hoche work, *Permitting the Destruction of Unworthy Life*, advocated *Sterbehilfe* as a compassionate and humanitarian response for those who requested it, pursuant to a carefully controlled process. The text was "crucial" and "most important" in creating acceptance within the profession for direct medical killing, and for active participation in the euthanasia program that was to be instituted. Wertham, *The Geranium in the Window*, (1966), reprinted in Death, Dying & Euthanasia at 610-611(D. Horan & D. Mall, eds 1980); Lifton, *The Nazi Doctors*, *supra* at 45-58.

Prof. Binding was one of Germany's leading specialists in constitutional and criminal jurisprudence. Dr. Hoche was a psychiatrist. The jurist Binding queried: "Should permissible taking of life be restricted . . . to an individual's act of suicide as it is in current law, or should it be legally extended to the

killing of fellow human beings, and under what conditions?"⁸ Issues in Law & Med. at 232. He answered affirmatively for three groups of persons: (1) "those irretrievably lost as a result of illness or injury, who, fully understanding their situation, posses and have somehow expressed their urgent wish for release"; (2) "incurable idiots" from whom "there is no valid consent to be killed" but whose lives are "completely without purpose" and "a fearfully heavy burden both for their families and for society"; and (3) formerly competent patients who, due to trauma, "have become unconscious and who, if they should ever again rouse from their comatose state, would waken to nameless suffering." *Id.* at 247-49.⁵

Hoche asked a somewhat different question, also answered affirmatively: "Is there human life which has so completely lost the attribute of legal value that its continuation has permanently lost all value both for the bearer of that life and for society?" *Id.* at 258. Hoche appeared to warn against a purely utilitarian approach:

In the times of need which we now face, we will never stop caring for the physically defective or ill, so long as they are not mentally dead. We will never cease giving the best possible care to the physically and mental ill, so long as there is any prospect of improvement in their condition.
Id. at 262.⁶

⁵ As to this last group, Binding expressed doubt that "a standard procedure can be created for managing this groups of killings. Cases will occur in which killing seems actually fully justified; but it can also happen that the agent, in the belief that he acted correctly, acted precipitously." *Id.* at 250.

⁶ What did Hoche mean by the "mentally dead"? He explained this condition in two ways. With respect to "external relationships," the mentally dead individual "lacks any productive accomplishments and lives in a condition of total helplessness, requiring care by another." *Id.* With respect to his "inner state," clear ideas, feelings, or acts of will cannot arise . . . no emotional links to the environment can arise (even though they may naturally be the object of the inclinations of someone else)." *Id.*

Binding and Hoche explicitly condemned mercy-killings which took place contrary to the will of the victim, and emphasized the consent of the victim as a necessary condition for the killing of incurably ill people.⁷ With regard to his first defined category, Binding stressed that the only people who may be candidates for having their deaths permitted are those who are terminally ill and who "have either requested death or consented to dying." 8 Issues in Law & Med. at 262.⁸ Consent was of crucial importance to Binding: "*every permitting of killing which requires violating the will to live of the actual or potential victim is ruled out.*" *Id.* (emphasis in original).

Hoche and Binding advocated providing *Sterbehilfe* in a carefully controlled process, with evaluation by a three-person panel of professionals and the ability of the person to withdraw consent at any time. *Id.* at 252. They recommended that the initiative be made by the patient in the form of an "application for permission." *Id.* The application would go to a government board composed of a physician, a psychiatrist, and a lawyer,

⁷ In general, euthanasia as described by Binding and Hoche and their German predecessors had a societal and statist component that distinguished it from the American tradition of individual rights, to which the current euthanasia movement adheres. See Lifton, *The Nazi Doctors*, *supra* at 47. The distinction, however, may be more sharp in theory than in practice. Contemporary euthanasia proponents do not rely exclusively on the autonomy of those whose lives would be ended, but on the notion that such persons have ceased to have a "life." See Rachels, Singer, and Harris, *supra* note 4. In the Netherlands, moreover, most physician-assisted deaths occur without the explicit request of the patient. See *Brief Amicus Curiae* of the American Suicide Foundation in No. 96-110.

⁸ As for the third category, Binding considered as proper candidates those who "would (had they not fallen into unconsciousness at the critical time or if they had been able to achieve awareness of the situation) have requested or consented." 8 Issues in Law & Med. at 250.

and unanimity would be required in granting permission. *Id.* The decree of permission would indicate that a "thorough investigation" had been undertaken, that the patient "seems beyond help," and that "there is no reason to doubt the sincerity of his consent." *Id.*

Yet, Binding conceded that this orderly procedure would not always be followed: "Perhaps following it is not even thinkable. Perhaps following the procedure, even expeditiously, would entail unbearable suffering for the patient." *Id.* at 253. Binding considered the possibility that doctors would be faced with the choice of "consign[ing]" the patient to continued suffering and the family and physician "to complete passivity" during the application process, or allowing the "accomplices" to satisfy their "consciences" that the required conditions were present for permissible killing. He favored the latter: "Without hesitation, I endorse the second alternative." *Id.* The second alternative would result in punishment of the accomplice in the case of "unpardonable" error. *Id.*⁹

2. Response of the German Medical Community and the Impact of the Rise of Nazism.

The Hoche and Binding monograph was much debated by the medical community in Germany after its publication. The legalization of medicalized killing was discussed and rejected at the 1921 *Karlsruhe Ärztetag*, medical convention, and at the 1922 Dresden conference of the Society for Forensic Psychiatry. Burleigh, *Death and Deliverance*, *supra* at 24.

⁹ As to the possibility of error, Binding writes: "the possibility of error by the Permission Board is undeniable. . . . But error is possible in all human actions." *Id.* at 254. He concludes: "all other actions of sympathy also involve possible error and perhaps an evil outcome. But who would want to limit the application of this most beautiful feature of human nature by pointing out such possible error?" *Id.* at 255.

Critics from the medical community warned that “compassionate” release for the afflicted would only be the first step toward a new medical ethic of death. Dr. M. Beer wrote in his book, *Ein schöner Tod: ein Wort zur Euthanasiefrage* 9 (Barmen 1914) (A Beautiful Death: A Word About the Question of Euthanasia), that physician aid-in-dying might be

the first step, but whether it would be the last appears to me to be very doubtful. . . . Once respect for the sanctity of human life has been diminished by introducing voluntary mercy killing for the mentally-healthy incurably ill, and involuntary killing for the mentally ill, who is going to ensure that matters stop there?

Burleigh, *Death and Deliverance*, *supra* at 15. Critics of Hoche and Binding also

despised the “utilitarian shopkeeper” mentality which appeared to inform the tract . . . Others worried about the inflationary, slippery-slope potentialities latent in the whole enterprise. A few had doubts regarding the inherent arbitrariness and perniciousness of value judgments regarding the value of human life.

Id. at 21.

In a major response to Hoche and Binding, *Das Problem der Abkürzung “lebensunwerten” Lebens* (1925) (*The Problem of Cutting Short Life Unworthy of Living*), Dr. Ewald Meltzer hotly disputed the claim that

people with mental handicaps had lost the last vestiges of human personality, stressing instead their capacity and will to enjoy life. [He argued that it is] “far more heroic to accept these beings to the best of one’s abilities, to bring sunshine into their lives, and therewith to serve humanity” than to kill them for utilitarian reasons . . . altruism was humanity’s distinguishing feature, [and] asylums for handicapped people were not only valuable centres of scientific research, but also tangible manifestations of Christian charity.

Burleigh, *Death and Deliverance*, *supra* at 21-22 (citations omitted).

While Binding and Hoche “turned out to be the prophets of direct medical killing,” their thesis remained a minority view within German psychiatry and medicine during the Weimar Republic. Lifton, *The Nazi Doctors*, *supra* at 48. The rise of the Nazis brought into power an ideology of eugenics that provided the environment for their thesis, with the willing cooperation of medical and academic leaders, to overcome the initial opposition. *Id.* at 22-44. The first manifestation of this policy of “negative eugenics” was the mandatory sterilization of the “unfit;” acceptance of medical killing was the critical second step. *Id.* at 42-44.¹⁰

3. Cultural Responses.

Eugenist theories promoting sterilization and euthanasia were widely propagated in German society through education and other means. Among the most prominent means used was film. In his novel *Mission and Conscience* (1936), later a popular film entitled “I Accuse,” Helmut Unger told a story of a young woman suffering from multiple sclerosis who believes that her life is no longer worth living and asks her physician husband to relieve her of her misery.

In a grand act of humanity, the husband gives his wife a fatal injection of morphine, while a friend of his (also a

¹⁰ As a consequence of these developments, the Ministry of Justice proposed in 1933 that it “be made possible for physicians to end the tortures of incurable patients, upon request, in the interests of humanity.” Gallagher, *By Trust Betrayed*, *supra* at 93. The penal code would be revised to permit physician aid-in-dying upon approval of a three-physician review panel. *Id.* The law was not enacted; indeed, at no time were German laws amended or repealed in order explicitly to legitimate medical killing.

doctor) accompanies the act with soothing and romantic music at the piano. [When he is brought to trial for murder, the husband] refuses to let his colleagues invent an alibi for him, because he is convinced he has done no wrong. [He is] acquitted on grounds that his act constituted an act of mercy [and] in a critical scene, the words of the Renaissance physician Paracelsus are recalled: "medicine is love."

Proctor, *Racial Hygiene*, *supra* at 182-83.

Several other pro-euthanasia films were produced during this period. See Burleigh, *Death and Deliverance*, *supra* at 183-219. The films argued that a medical ethic of preserving life only caused unnecessary pain and misery; "we humans use science to prolong suffering, where we could use science to bring deliverance." *Id.* at 204 (quotation from film). Such an ethic, these films said, stemmed from an "exaggerated concern for humanity," combined with "a religion which is alienated from reality," and "the dictates of an outmoded legal code", and which ought to be abandoned. *Id.* at 201-05 (quotations from films). Later, the key role of such images in leading to the acceptance of medical killing became apparent.¹¹

¹¹ One of the persons involved in these physician-assisted death programs was Alfons Klein, supervisor at Hadamar Sanitorium. His attorney described the course of events leading up to wholesale slaughter.

In a motion picture called "I Accuse" the problem of euthanasia, that is mercy killing, was expounded. This picture was simply a prelude for things to come, because shortly after the beginning of the war the government passed a law whereby people who were afflicted mentally should be put out of the way. . . . from January 1941 to July 1945, more than 10,000 German mental patients were killed in Hadamar alone.

The Hadamar Trial, *infra* at 220-21. Counsel for Hadamar defendant Dr. Adolf Wahlmann further described what has to happen in the elite German medical community.

The opinion was held in important circles that people of so low a physical or mental standard that their lives were

B. Direct Medical Killing Began With Permission for Physician-Assisted Death In the Cases of Incurable Infants and Adults and Rapidly Expanded to Other Categories of Patients.

The proposals of Hoche, Binding, and others in the German and international community in favor of physician aid-in-dying were put into practice in the 1930s. First, child euthanasia was permitted for disabled and "defective" infants and children. Soon thereafter, an adult program for an "easy death" for incurably sick and mentally ill Germans was instituted on grounds of compassion. Ultimately, the genocide that was the Final Solution grew out of these programs of medicalized killing.

This "euthanasia" program was motivated by a mixture of concerns, some statist and some humanitarian in nature. It is important to note, however, that racial and anti-Semitic sentiments played no role in the original design or implementation of this program. In fact, the German government "did not want to grant this philanthropic act to the Jews." Brandt, *Nurem.Mil.Trib.*, *infra* at 877-80; Kamisar, *Non-Religious Views*, *supra* at 470; Gallagher, *By Trust Betrayed*, *supra* at 69 (Viktor Brack maintained, "the blessing of euthanasia should be granted only to [true] Germans"). "[I]t is worth remembering that the engine which drove the early moral transformation of German medicine was not the

not worth living, and for whom there was no hope of recovery or of ability to work, should be removed after medical examination, especially when they themselves were a burden on their relatives and on the general public. . . . In Germany this point of view was put before the public through the media of books and movies, and was gradually recognized by widening circles.

The Hadamar Trial, *infra* at 226.

ideology of racial discrimination, but medical economics." Derr, *supra*, 8 Issues in Law & Med. at 494.

[The] moral collapse of German medicine was not caused by anti-Semitism. Ironically, [Jews] did not deserve the 'benefit' of psychiatric euthanasia. [Nor was the collapse] caused by National Socialist pressure. . . . the collapse did not begin with the hacks and quacks. It began at the top, with the heads of departments of academic medicine.

Id. at 488-89.¹²

Furthermore, it is critical to note that physicians were invited, not compelled or otherwise forced, to participate in this program. Gallagher, *By Trust Betrayed*, *supra* at 60. "Doctors were never ordered to murder psychiatric patients and handicapped children. They were empowered to do so, and fulfilled their task without protest, often on their own initiative." Proctor, *Racial Hygiene*, *supra* at 193; see also Gallagher, *supra* at 5, 46.

1. Merciful Deaths for Children.

The practice of euthanasia, as illustrated by two early cases, began with requests from individuals for physician-assisted death. In March 1937, a child was killed by his father because he was significantly mentally ill. When put on trial for murder, the local health office came to the father's defense, influencing the court to grant him a nominal prison sentence instead of the death penalty asked for by the prosecutor. Proctor, *Racial Hygiene*, *supra* at 182.

The next year, a man named Knauer wrote the German government asking that his blind and mentally retarded

¹² "It would be a mistake to call it a Nazi program. It was not. The program was conceived by physicians and operated by them. They did the killing." Gallagher, *By Trust Betrayed*, *supra* at 5.

daughter, born without an arm and leg, be granted *Gnadentod* (mercy death). The Chancellor instructed his personal physician, Dr. Karl Brandt, to investigate, and, if the letter were true, to grant the request. Proctor, *Racial Hygiene*, *supra* at 186; Burleigh, *Death and Deliverance*, *supra* at 93-96. Brandt found "a child who was born blind, an idiot—at least it seemed to be an idiot—and it lacked one leg and part of one arm." Gallagher, *By Trust Betrayed*, *supra* at 47; Proctor, *Racial Hygiene*, *supra* at 186. According to the testimony of Brandt, "The parents should not feel themselves incriminated at some later date as a result of this euthanasia—that the parents should not have the impression that they themselves were responsible for the death of this child." Alexander Mitscherlich, *The Death Doctors* (1962) (James Cleugh, trans.) at 234.

Many parents were eager to obtain the *Wohltat* of physician-assisted death for their ill, deformed, or disabled children and many "wrote to hospitals to ask if their child could be relieved of his or her misery and be granted euthanasia." Proctor, *Racial Hygiene*, *supra* at 194; Kamisar, *supra*, 42 Minn. L. Rev. at 1032-1033¹³

Both doctors and parents preferred to use euphemisms, to allow for psychological defense mechanisms of rationalization and denial of what really was happening. After taking a poll of parental opinion, it was determined by the government that, al-

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The business of taking a sick child on a costly and fruitless round of visits to doctors and hospitals frequently seems to have worn down their patience. They had exhausted most of the options before they were promised specialist treatment for the child. . . . The initiative to consign a child to one of these clinics sometimes came from parents, some of whom, like the twenty-five-year-old mother of a blind and mentally handicapped four-year-old child, were already of the opinion that it would have been better if the child had died at birth. Burleigh, *Death and Deliverance*, *supra* at 101.

though many supported *Gnadentod* for their severely disabled children, "parents would prefer it if they were told that their child had succumbed to this or that illness." Burleigh, *Death and Deliverance*, *supra* at 98.¹⁴

As many as 6,000 children were provided the "benefit" of euthanasia in this first phase of physician-assisted death in Germany. *Id.* at 111; Lifton, *The Nazi Doctors*, *supra* at 50, 56.

2. T-4 Program: Euthanizing of Terminally Ill, Disabled, and Mentally Incompetent German Patients.

The German government also received requests from adults with cancer and severe disabilities for a mercy death. Burleigh, *Death and Deliverance*, *supra* at 93. Numerous people, believing that they were acting with compassion, wished that their handicapped relatives could be "released from their suffering." Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* 171-72 (1995).

In May 1939, an advisory group, the Committee for the Scientific Treatment of Severe and Genetically Determined Illness, was formed to determine if and how a euthanasia program for children and adults would operate. Proctor, *Racial Hygiene*, *supra* at 186. The adult project was housed in Berlin at number 4 Tiergartenstrasse, giving rise to its code-name "T-4." In the beginning, there appeared to be a broad level of support for this throughout the country. *Id.* at 194.

¹⁴ Few parents, however, were as explicit as a woman who requested that the Ministry of the Interior "have her two 'idiotic children' taken to the asylum at Schleswig 'in order to carry out euthanasia.'" *Id.* at 102.

Patients then began to be euthanized by lethal injection at various hospitals and other health care institutions. The T-4 doctors did not consider themselves to be killers, but ministers of medical treatment, although there was some concern that their actions be accorded some legitimate legal authority. Friedlander, *The Origins of Nazi Genocide*, *supra* at 300.

In September 1939, the chancellor responded to pressure to provide legal immunity for the doctors engaged in *Gnadentod* mercy killings and he issued a memorandum stating that

Reichsleiter [Philip] Bouhler and Dr. [Karl] Brandt, M.D. are charged with the responsibility of enlarging the authority of certain physicians, to be designated by name, in such a manner that persons who, according to human judgment, are incurable can, upon a more careful diagnosis of their condition of sickness, be accorded a mercy death.

United States v. Brandt et al., Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Nuremberg, October 1946-April 1947, Vol. II:196.

This edict, however, did not have the force of law, even under the standards of the Nazi regime. Burleigh, *Death and Deliverance*, *supra* at 112-113. Another law to explicitly legalize physician-assisted death was proposed in 1940. Like the version proposed in 1933, it provided that

Anyone suffering from an incurable illness that leads to strong debilitation of either oneself or others can, upon explicit request of the patient and with the permission of a specifically appointed physician, receive dying help (*Sterbehilfe*) from a physician.

Proctor, *Racial Hygiene*, *supra* at 193; Burleigh, *Death and Deliverance*, *supra* at 98-99. An additional clause provided further that those people who were mentally incompetent to decide for themselves to exercise this new "right" were entitled to have others make that decision for them on their behalf. *Id.*

This law was never formally enacted because the decision was made “to keep the question of euthanasia a ‘private matter’—between doctors and their patients.” Proctor, *Racial Hygiene*, *supra* at 193. The German medical profession was determined to keep the practice in their hands alone. “The needle belongs in the hand of the doctor,” said Viktor Brack, head of one euthanasia program in 1939. Karl Brandt agreed, stressing that “gassings should only be done by physicians.” Proctor, *Racial Hygiene*, *supra* at 190.

Government legal authorities initially intended that the T-4 program’s *Sterbehilfe* would be lawful only for “those cases where physicians, upon their personal decisions, [can] relieve incurably ill patients from their suffering by administering a drug for mercy killing.” Lifton, *The Nazi Doctors*, *supra* at 138-39. Within a short period of time, “a network of some thirty killing areas within existing institutions was set up.”¹⁵ Lifton, *The Nazi Doctors*, *supra* at 54; Burleigh, *Death and Deliverance*, *supra* at 101. Morphine, scopolamine, and prussic acid (cyanide) injections were initially used for the T-4 project because they had more of a “medical aura” than gas. However, objections to use of carbon monoxide gas were soon overcome because, not only was it more efficient, but Brandt said that carbon monoxide was painless and it “would be the most humane form of death.” Lifton, *The Nazi Doctors*, *supra* at 72

¹⁵ These hospitals and health-care facilities included Württemberg, Brandenburg, Hartheim, Sonnenstein, Hadamar, Leipzig-Dösen, Eglfing-Haar, Meseritz-Obrawalde, Tiegenhof, Langenhorn, Bernburg, Eichberg, Kalmenhof, Uchtspringe, Königslutter, Scheuern, Mainkofen, Am Steinhof, and Kaufbeuren. Friedlander, *The Origins of Nazi Genocide*, *supra* at 87-89, 95, 152-53, and 162. In fact, the killing secretly continued at Kaufbeuren, Eglfing-Haar, and a few other hospitals for months *after* the war ended and Allied forces assumed control. Gallagher, *By Trust Betrayed*, *supra* at 249-50.

In January 1940, Brandt, Brack and others conducted the first large-scale test of assisted death for incurable adults in a psychiatric hospital near Berlin. Proctor, *Racial Hygiene*, *supra* at 189-90. It was a gassing process, which “included a fake shower room with benches, the gas being inserted from the outside into water pipes with small holes through which the carbon monoxide could escape.” Lifton, *The Nazi Doctors*, *supra* at 71.

What occurred in the adult program is exemplified by the hospital at Hadamar, one of the major T-4 institutions. Between January and August 1941, over 10,000 mentally ill Germans were provided a “painless death” in the shower-room gas chambers at Hadamar. *The Hadamar Trial: Proceedings of a Military Commission for the Trial of War Criminals*, Introduction at xxiv (E. Kintner ed. 1948).¹⁶ An administrative supervisor at Hadamar was Alfons Klein. He testified at his war crimes trial that, from October 1940

until January 1940 [The Hadamar] Institution was maintained only for German mental patients. In January 1941, plans were made to kill mental patients and to burn the corpses. This method was carried on and used until August 1941, when it was discontinued.

Id. at 69-70.

Heinrich Ruoff, chief male nurse who worked more closely with the patients, remembered that the T-4 program at Hadamar began slightly earlier.

¹⁶ Counsel for Hadamar physician Adolf Wahlmann insisted at his war crimes trial that, “in general, the people killed were those faced with a permanent illness, for whom a completely painless death was a relief,” *The Hadamar Trial*, *supra* at 228. “Insane people are useless to society and as a rule do not endure pain . . . Incurable tubercular patients, on the other hand, have to suffer terrific pain,” added counsel for Heinrich Ruoff. *Id.* at 233.

In 1940 the program of killing started. Those people who were brought here were German mentally sick. These people were gassed to death and then burned. . . . During the year 1941, because of complaints from Germans, this work was eliminated.

Id. at 75.

As Ruoff said, by 1941, word began to spread of involuntary killings. So, in August 1941, the psychiatric/physician-assisted death program at Hadamar and the other T-4 hospitals were officially ordered to be discontinued. By this time, 80,000-100,000 people had been killed under the T-4 program. Lifton, *The Nazi Doctors*, *supra* at 192; Burleigh, *Death and Deliverance*, *supra* at 160. At Hadamar, however, the program never ceased. Only the method of death changed; another 3,500 were euthanized by lethal injection between August 1941 and August 1942. *The Hadamar Trial*, *supra* at Introduction xxiv.

Beginning in 1942, the program recommenced elsewhere, except instead of gas, injections and starvation were the method of inducing death, largely on a case-by-case basis. Proctor, *Racial Hygiene*, *supra* at 192.¹⁷

¹⁷ About this point in time it was decided that German-held territory would be populated only by Germans. Ideas were circulated regarding the issue of what to do with Jews. *United States, et al. v. Hermann Goering, et al.*, 6 F.R.D. 69, 119 (1946) (judgment of the International Military Tribunal). Early measures included a requirement that all Jews must wear the Star of David, which was decreed in September 1941. Friedlander, *The Origins of Nazi Genocide*, *supra* at 288.

German-Jews had their citizenship revoked and were treated as foreigners; policies were “directed towards the complete exclusion of Jews from German life.” Goering, 6 F.R.D. at 127. Deportations of Jews from the German homeland did not begin until October 1941. Friedlander, *The Origins of Nazi Genocide*, *supra* at 288. Jews were rounded up and imprisoned, and their property was seized. The “original purpose [of the concentration camps] was to imprison without trial all those persons who

3. Genocide Under 14f13: “Special Treatment” for Jews and Other “Undesirables.”

World War II caused a change in emphasis and an acceleration of the killing process. Resources were scarce, and it was perceived that the armed forces had a greater claim to food, clothing, and medicine than did the sick, mentally ill, and social undesirables. The government accordingly took advantage of the distractions of the war to eliminate these “burdensome” people.

“The original ‘euthanasia’ project, the killing of those who were seriously ill [T-4], was extended to killing virtually anyone whose death was desired.” Lifton, *The Nazi Doctors*, *supra* at 255. First, hospitalized Jews who had previously been denied a mercy death were given *Sonderbehandlung*, “special treatment,” and killed along with Germans in the euthanasia program. Later, it was ordered that Jews and other undesirables be transported from the concentration camps to the same killing centers used by the T-4 program. Lifton, *The Nazi Doctors*, *supra* at 134-44; Burleigh, *Death and Deliverance*, *supra* at 132-33.

Overall, it is estimated that 5,000 were provided a “mercy” death in the child operation, 80,000 to 100,000 in the adult T-4 program, 20,000 concentration camp inmates in the 14f13 project; “special treatment” against Jews in hospitals

were opposed to the Government, or who were in any way obnoxious to German authority.” Goering, 6 F.R.D. at 117. It was not until later that “camps became places of organized and systemic murder.” *Id.*

It was not until March 1941 that the Frankfurt “Institute for the Investigation of the Jewish Question,” was inaugurated. B. Müller-Hill, *Murderous Science* 45 (1988). Even then, Auschwitz survivor Prof. Henry Friedlander reports, “the policy toward Jews did not yet include killings.” Friedlander, *The Origins of Nazi Genocide*, *supra* at 21.

eliminated another 1,000. Friedlander, *The Origins of Nazi Genocide*, *supra* at 150; Lifton, *The Nazi Doctors*, *supra* at 142. Some estimate the total toll of physician-assisted death was 275,000. Alexander, *Medical Science Under Dictatorship*, *supra*, 241 New Eng. J. Med. at 45-46. Other estimates reach as high as 400,000, from the child euthanasia, T-4, *Sonderbehandlung*, and 14f13 operations combined. Lifton, *The Nazi Doctors*, *supra* at 142. The true number of lives lost can never be known.¹⁸

III. TESTIMONY FROM THE TRIALS OF MEDICAL KILLINGS IN GERMANY PROVES THE NECESSITY OF AN ABSOLUTE PROHIBITION AGAINST KILLING BY PHYSICIANS.

Perhaps the best evidence for concluding that society must refrain from permitting any degree of killing by physicians is the testimony of those who participated in these crimes, as well as those who investigated and prosecuted them.

German physicians and other health care workers were put on trial for murder, crimes against humanity, and war crimes for their participation in the child euthanasia, T-4, 14f13, and “special treatment” projects.¹⁹ Throughout these trials, the

¹⁸ On January 20, 1942, nearly four years after the euthanasia program for Germans began with the *Gnadentod* of the Knauer child, the plans for the Final Solution of the “Jewish Problem” were completed at the Wannsee Conference, a meeting of thirteen high-ranking government officials. Proctor, *Racial Hygiene*, *supra* at 210; Lifton, *The Nazi Doctors*, *supra* at 158. But even then, “during early 1942, the details of the killing procedure were not yet clear, and were not solved until spring with the establishment of gas chamber camps in Poland.” Lifton, *The Nazi Doctors*, *supra* at 158.

¹⁹ Prof. Friedlander reports that a massive documentary record substantiate[s] the nature of these crimes. In addition to the Allied, German, and Austrian trials of the late 1940s, the German judiciary had conducted numerous detailed investigations and long trials during the 1960s and 1970s.

defendants insisted that their actions were motivated by compassion and humanitarian concerns. Valentin Faltlhauser insisted that, for him, “the decisive motive was compassion.” Burleigh, *Death and Deliverance*, *supra* at 277. Pediatrician Ernst Wentzler recalled, “I had the feeling that my activity was something positive, and that I had made a small contribution to human progress.” *Id.* at 100.

Also prevalent was the sentiment that, as physicians, these defendants’ actions ought not be scrutinized by lawyers and judges. Dr. Hermann Pfannmüller, medical director at the Elgfling-Haar asylum hospital, complained at his trial before the Nuremberg Tribunal: “I am a doctor confronted with a lawyer and our points of view are completely divergent.” Burleigh, *Death and Deliverance*, *supra* at 273.

Dr. Karl Brandt, who had played a critical role in the original authorization of the euthanasia program, spoke most directly in defense of its legitimacy, arguing through his attorney it was within the authority of the state to institute such a program. Nurem. Mil. Trib. II:135. In the closing argument for his case, Brandt made the following personal statement:

Do you think that it was a pleasure for me to receive the order to permit euthanasia? For fifteen years I had toiled at the sickbed and every patient was to me like a brother. I worried about every sick child as if it had been my own. . . . I fully realize the problem; it is as old as mankind, but it is not a crime against man nor humanity. It is pity for the incurable, literally. Here I cannot believe like a clergyman or think as a jurist. I am a doctor and I see the law of nature as being the law of reason. In my heart there is a love of mankind, and so it is in my conscience. That is why I

Friedlander, *The Origins of Nazi Genocide*, *supra* at Preface xi. For a listing of over sixty various post-war German court cases and prosecutions for murder for participation in the euthanasia programs, see Friedlander, *The Origins of Nazi Genocide*, *supra* at 387-89.

am a doctor! . . . Death can mean deliverance. Death is life—just as much as birth. It was never meant to be murder.

Nurem. Mil. Trib. II:139.

Similar arguments were put forth by Alfons Klein and other defendants at the Hadamar trial. Klein insisted that it was only in extreme cases, such as those involving the final stages of tuberculosis, that patients were "helped along" and saved from an insufferable prolonged death. "Only those people died who were very close to death already." *The Hadamar Trial, supra* at 88.

One must therefore, in judging the facts, differentiate whether healthy, valuable lives were left to die, or whether those who had death stare into their face were given an injection of mercy to relieve them of their incurable and painful suffering. . . . I can say that the people were very ill and were saved from their suffering.

Id. at 102-03. Other Hadamar defendants justified the killings as acts of "mercy" and "deliverance." Burleigh, *Death and Deliverance, supra* at 152, 160.

The War Crimes tribunals invariably rejected these defenses. Nevertheless, they are indicative of the attitude that the defendants brought to their work in asylums and hospitals, an attitude which some specifically attributed to Hoche and Binding, and others to the general current of thought in German society. The attitude was shared by those who escaped punishment after the War. For example, Dr. Werner Catel, a "referee" in the T-4 program, later published a book advocating the "mercy killing" of severely defective infants. Burleigh, *Death and Deliverance, supra* at 284-285. In the last of the major euthanasia trials, in 1986, the defendants repeated the refrain that they had killed "out of love and pity." *Id.* at 289. These latter-day restatements of the (failed) defenses offered by defendants of 40 years earlier suggests a level of

sincerity inconsistent with the theory that these attempted justifications had been manufactured after the fact out of mere expediency. The perpetrators believed in the notion of "life unworthy of living" before, during, and after their horrendous crimes.

Those who investigated and prosecuted these crimes accepted the fact that these physicians had been corrupted, not merely by Nazi ideology, but first by acceptance of a fundamental change in attitude regarding the role of the physician toward the chronically sick.

U.S. Brigadier General Telford Taylor, chief of counsel for the prosecution, described the prominent physicians who were tried and convicted of murder:

The defendants . . . are charged with murder, tortures and other atrocities committed in the name of medical science. . . . [They] did not kill in hot blood, nor for personal enrichment . . . they are not all perverts. They are not ignorant men. Most of them are trained physicians and some of them are distinguished scientists. The perverse thoughts and distorted concepts which brought about these savageries are not dead. They cannot be killed by force of arms. They must not become a spreading cancer in the breast of humanity. They must be cut out and exposed.

Nurem. Mil. Trib. I:66-71.

Dr. Leo Alexander noted the origin and persistence of such ideas in the wake of his experience as a medical expert at the Nuremberg medical trials:

Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude,

basic in the euthanasia movement, that there is such a thing as a life not worthy to be lived.

Alexander, *supra*, 241 New Eng. J. Med. at 44.²⁰

Justice Robert Jackson, Chief of Counsel for the United States at Nuremberg Trial of Major German War Criminals, also observed the corruptive influence of accepting medical killing even in so-called "hard" cases:

To begin with, [the Hadamar euthanasia program] involved only the incurably sick, insane and mentally deficient patients of the Institution. It was easy to see that they were a substantial burden to society, and life was probably of little comfort to them. It is not difficult to see how, religious scruples apart, a policy of easing such persons out of the world by a completely painless method could appeal to a hard-pressed and unsentimental people. But "euthanasia" taught the art of killing and accustomed those who directed and those who administered the death injections to the taking of human life. Once any scruples and inhibitions about killing were overcome and the custom was established, there followed naturally an indifference as to what lives were taken. Perhaps also those who become involved in any killings are not to be in a good position to decline further requests. If one is convinced that a person should be put out of the way because, from no fault of his own, he has ceased to be a social asset, it is not hard to satisfy the conscience that those who are wilful enemies of the prevailing social order have no better right to exist. And so Hadamar drifted from a hospital to a human slaughterhouse.

²⁰ In the last year of his life, Dr. Alexander drew explicit links between the German experience he had studied so extensively and the advocacy for legalized euthanasia in the United States: "It is much like Germany in the Twenties and Thirties. The barriers against killing are coming down." Patrick G. Derr, "The Real Brophy Issue," *Boston Globe* 15 (Nov. 18, 1985).

Forward to *The Hadamar Trial, supra* at xiv.

In conclusion, Justice Jackson issued a warning that should not be lost in the midst of arguments that American medicine would not be corrupted by the legalization of physician-assisted suicide:

A freedom-loving people will find in the records of the war crimes trials instruction as to the roads which lead to such a regime and the subtle first steps that must be avoided.

Id.

CONCLUSION

Frustrated with the ethic of "preserving every existence, no matter how worthless," Dr. Alfred Hoche in 1920 wrote, expectantly: "A new age will arrive—operating with a higher morality and with great sacrifice—which will actually give up the requirements of an exaggerated humanism and overvaluation of mere existence." ⁸ Issues in Law & Med. at 265. Euthanasia proponents of our day, too, seek with great zeal to usher in a new age. They speak, in words echoing from a distant age, that it is cruel to deprive those who are suffering from their desired means to peace and freedom from pain. Like Binding, they scold: "Not granting release by gentle death to the incurable who long for it: this is no longer sympathy, but rather its opposite." *Id.* at 254.

The early promoters of euthanasia appeared to be sincere in their belief in the virtues of merciful death. Today's promoters of physician-assisted suicide may also be sincere, but it is a sincerity born of an unpardonable carelessness. Unlike their predecessors, euthanasia proponents today have the benefit of the lesson of history, which has taught the true nature of physician-assisted killing as a false compassion and a perversion of mercy. History warns that the institution of assisted-death gravely threatens to undermine the foundational ethic of

the medical profession and the paramount principle of the equal dignity and inherent worth of every human person.

The decisions of the Second Circuit and the Ninth Circuit should be reversed, and the complaints dismissed.

Respectfully submitted,

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